

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AMANDA M. GIBBS,

NO. : 4:14-CV-5058-EFS

Plaintiff,

ORDER GRANTING DEFENDANT'S
SUMMARY-JUDGMENT MOTION AND
DENYING PLAINTIFF'S SUMMARY-
JUDGMENT MOTION

CAROLYN COLVIN, Acting
Commissioner of Social Security,

Defendant.

Before the Court, without oral argument, are two cross-summary judgment motions. Plaintiff Amanda Gibbs appeals the Administrative Law Judge's (ALJ) denial of benefits. ECF No. 19. Ms. Gibbs contends the ALJ erred because she 1) failed to fully accept the opinions of Ms. Gibbs' treating and examining health care providers, 2) improperly rejected Ms. Gibbs' subjective complaints and Mr. Gibbs' lay-witness statements, and 3) failed to include all of Ms. Gibbs' limitations resulting from her fibromyalgia and anxiety into the hypothetical question posed to the vocational expert and therefore the identified jobs are not consistent with Ms. Gibbs' functional limitations. The Commissioner of Social Security ("Commissioner") asks the Court to affirm the ALJ's decision that Ms. Gibbs is capable of performing substantial gainful activity in a field for which a significant number of jobs exist in the national economy. After reviewing the record and relevant authority the Court is fully

1 informed. For the reasons set forth below, the Court affirms the ALJ's
2 decision and therefore denies Ms. Gibbs' motion and grants the
3 Commissioner's motion.

4 **A. Statement of Facts¹**

5 Ms. Gibbs is a 35-year-old, mother of three children, who has a high-
6 school education. In the past, she worked as a prep cook, office manager,
7 automobile title clerk, and bar waitress. In October 2009, Ms. Gibbs
8 sought treatment from Robert Whitson, D.O. for panic attacks, which she
9 had experienced for the previous three months. Dr. Whitson diagnosed Ms.
10 Gibbs as suffering from post-traumatic stress disorder (PTSD). Ms. Gibbs
11 continued to be treated by Dr. Whitson through 2012, during which time,
12 Dr. Whitson also diagnosed her as suffering from stress, tension
13 headaches, agoraphobia, and fibromyalgia. In regard to the fibromyalgia
14 diagnosis, Dr. Whitson noted, without an articulated explanation, that
15 Ms. Gibbs had 18 out of the 18 fibromyalgia trigger points in July 2010
16 and April 2011.

17 On December 22, 2010, Farrukh Hasmi, M.D., evaluated Ms. Gibbs and
18 diagnosed her as suffering from generalized anxiety disorder and social
19 phobia. Three months later, Ms. Gibbs was evaluated by Joan Davis, M.D.,
20 who diagnosed Ms. Gibbs as experiencing panic disorder with agoraphobia
21 and major depressive disorder. Dr. Jones noted that Ms. Gibbs, in her
22 then-current condition, would experience difficulty in maintaining
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¹ The facts are only briefly summarized. Detailed facts are
28 contained in the administrative hearing transcript, the ALJ's decision,
the parties' briefs, and underlying records.

1 attendance in the workplace, secondary to her panic disorder with
2 agoraphobia, and difficulty dealing with usual workplace stressors, and
3 also commented that a higher dose of medication may help treat Ms. Gibbs'
4 anxiety and that she could perform simple, repetitive tasks and could
5 interact with supervisors, coworkers, and the public.

6 About a year later in January 2012, Matthew Peterson, M.D. evaluated
7 Ms. Gibbs and reported that her pain was getting progressively worse. He
8 found her pain was aggravated with extension and lateral flexion/bilateral
9 rotation. In April 2012, he noted she had tender spots in the spine,
10 shoulders, upper and mid posterior neck, both subclavical areas, lateral
11 elbows, both TM joints, feet, and toes.

13 On May 7, 2012, Dr. Whitson completed a physical medical source
14 statement for Ms. Gibbs. Dr. Whitson found Ms. Gibbs 1) was limited to 2
15 hours sitting, $\frac{1}{2}$ hour standing, and $\frac{3}{4}$ hour walking at one time; 2) could
16 lift up to 5 pounds frequently and up to 20 pounds occasionally; 3) could
17 never crawl, climb, twist torso, or twist her neck; 4) could seldom
18 maintain a flexed neck position or forward bent position, or work with
19 hands outstretched; and 5) could reach only occasionally.

21 In the summer and fall of 2012, Ms. Gibbs was evaluated by Dr. John
22 Groner on three occasions. Dr. Groner noted that Ms. Gibbs had tenderness
23 in the upper and lower extremities, clavicles, and shoulders, and that
24 Ms. Gibbs reported her pain was getting worse. Dr. Groner administered an
25 epidural steroid injection in September 2012.²

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28 ² It was later recommended that Ms. Gibbs receive a second steroid
injection; the record does not indicate whether she received the second injection.

1 In June 2012, Wing C. Chau, M.D., diagnosed Ms. Gibbs with
2 fibromyalgia and psychiatric disorders. Dr. Chau completed a medical
3 source statement, finding Ms. Gibbs was limited to sitting, standing, and
4 walking for one hour at a time, she could frequently reach, handle, and
5 feel, she could occasionally pull, stoop, and kneel, and she could never
6 crouch or crawl. In September 2012, Ed Anderson, MSPT, completed a
7 functional capacity evaluation, in which he found Ms. Gibbs was limited
8 to sedentary work up to four hours a day and that she needed accommodations
9 to change positions to minimize aggravation of back symptoms.

10 **B. Procedural History**

11 Ms. Gibbs applied for disability insurance benefits on January 3,
12 2011, alleging an onset day of July 6, 2009. Benefits were denied initially
13 and also upon reconsideration. Ms. Gibbs requested a hearing, and in May
14 2012, a hearing was held before an ALJ. The ALJ ordered a post-hearing
15 physical consultative evaluation—Dr. Chau's evaluation. A second hearing
16 was held before the ALJ on December 6, 2012; Ms. Gibbs testified at the
17 hearing. Ms. Gibbs testified that her anxiety caused her not to want to
18 leave the house or drive a car, sitting makes her uncomfortable, she is
19 tired due to lack of continuous sleep, she suffers migraines at least 15
20 days out of the month, and her fibromyalgia causes pain in her entire
21 back, neck, shoulders, and hips.

22 In a written decision, the ALJ determined that Ms. Gibbs suffered
23 the following severe impairments: fibromyalgia, anxiety, and agoraphobia.
24 The ALJ determined that due to these severe impairments that Ms. Gibbs
25 could not perform her past relevant work, but found that other jobs were
26 available and that Ms. Gibbs could perform these jobs notwithstanding her
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1 severe impairments. Therefore, the ALJ denied Ms. Gibbs' benefits. Ms.
2 Gibbs' request for review with the Appeals Council was denied.

3 Ms. Gibbs filed this lawsuit, appealing the ALJ's decision.
4 Thereafter, the parties filed the instant summary-judgment motions.

5 **C. Disability Determination**

6 A "disability" is defined as the "inability to engage in any
7 substantial gainful activity by reason of any medically determinable
8 physical or mental impairment which can be expected to result in death or
9 which has lasted or can be expected to last for a continuous period of
10 not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).
11 The decision-maker uses a five-step sequential evaluation process to
12 determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

14 Step one assesses whether the claimant is engaged in substantial
15 gainful activities during the relevant period. If she is, benefits are
16 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is not, the decision-
17 maker proceeds to step two.

18 Step two assesses whether the claimant has a medically severe
19 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c),
20 416.920(c). If the claimant does not have a severe impairment or
21 combination of impairments, the disability claim is denied. If the
22 impairment is severe, the evaluation proceeds to the third step.

24 Step three compares the claimant's impairment with a number of listed
25 impairments acknowledged by the Commissioner to be so severe as to preclude
26 substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 404 Subpt. P App.
27 1, 416.920(d). If the impairment meets or equals one of the listed
28 impairments, the claimant is conclusively presumed to be disabled. If the

1 impairment does not meet or equal one of the listed impairments, the
2 evaluation proceeds to the fourth step.

3 Step four assesses whether the impairment prevents the claimant from
4 performing work she has performed in the past. This includes determining
5 the claimant's residual functional capacity. 20 C.F.R. §§ 404.1520(e),
6 416.920(e). If the claimant is able to perform her previous work, she is
7 not disabled. If the claimant cannot perform this work, the evaluation
8 proceeds to the fifth step.

9 Step five, the final step, assesses whether the claimant can perform
10 other work in the national economy in view of her age, education, and work
11 experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); see *Bowen v. Yuckert*,
12 482 U.S. 137 (1987).

13 The burden of proof shifts during this sequential disability
14 analysis. The claimant has the initial burden of establishing a *prima
facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438
15 F.2d 920, 921 (9th Cir. 1971). The claimant meets this burden if she
16 establishes that a physical or mental impairment prevents her from
17 engaging in her previous occupation. The burden then shifts to the
18 Commissioner to show 1) the claimant can perform other substantial gainful
19 activity, and 2) that a "significant number of jobs exist in the national
20 economy" which the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
21 1498 (9th Cir. 1984). A claimant is disabled only if her impairments are
22 of such severity that she is not only unable to do her previous work but
23 cannot, considering her age, education, and work experiences, engage in
24 any other substantial gainful work which exists in the national economy.
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26 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 **D. Standard of Review**

2 On review, the court considers the record as a whole, not just the
 3 evidence supporting the ALJ's decision. *Weetman v. Sullivan*, 877 F.2d 20,
 4 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir.
 5 1980)). The court upholds the ALJ's determination that the claimant is
 6 not disabled if the ALJ applied the proper legal standards and there is
 7 substantial evidence in the record as a whole to support the decision.
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 9 *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. §
 10 405(g)); *Brawner v. Sec'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th
 11 Cir. 1987) (recognizing that a decision supported by substantial evidence
 12 will be set aside if the proper legal standards were not applied in
 13 weighing the evidence and making the decision). Substantial evidence is
 14 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
 15 n.10 (9th Cir. 1975), but less than a preponderance, *McAllister v.*
 16 *Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989); *Desrosiers v. Sec'y of*
 17 *Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). "It means such
 18 relevant evidence as a reasonable mind might accept as adequate to support
 19 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations
 20 omitted). "[S]uch inferences and conclusions as the [ALJ] may reasonably
 21 draw from the evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d
 22 289, 293 (9th Cir. 1965). If the evidence supports more than one rational
 23 interpretation, the court must uphold the ALJ's decision. *Allen v.*
 24 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

25 **E. Analysis**

26 The Court takes each of Ms. Gibbs' challenges to the ALJ's decision
 27 in turn.
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1 **1. Ms. Gibbs' Credibility**

2 Ms. Gibbs argues the ALJ failed to specifically identify 1) what
3 testimony of Ms. Gibbs he found incredible regarding the severity of her
4 symptoms, and 2) what evidence the ALJ relied on to reject Ms. Gibbs'
5 subjective complaints.

6 A two-step analysis is used by the ALJ to assess whether a claimant's
7 testimony regarding subjective pain or symptoms is credible. *Garrison v.*
8 *Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). Step one requires the ALJ to
9 determine whether the claimant presented objective medical evidence of an
10 impairment, which could reasonably be expected to produce some degree of
11 the pain or other symptoms alleged. *Lingenfelter v. Astrue*, 504 F.3d 1028,
12 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir.
13 1996). Objective medical evidence of the pain or fatigue, or the severity
14 thereof, need not be provided by the claimant. *Garrison*, 759 F.3d at 1014.
15 If the claimant satisfies the first step of this analysis, and there is
16 no evidence of malingering, the ALJ must accept the claimant's testimony
17 about the severity of her symptoms unless the ALJ provides specific,
18 clear, and convincing reasons for rejecting the claimant's symptom-
19 severity testimony. *Id.* (recognizing that the clear-and-convincing
20 standard is a demanding standard).

23 In pertinent part, the ALJ stated:

24 After careful consideration of the evidence, the undersigned
25 finds the claimant's medically determinable impairments could
26 reasonably be expected to cause the alleged symptoms; however,
27 the claimant's statements concerning the intensity, persistence
28 and limiting effects of these symptoms are not credible to the
extent they are inconsistent with the above residual functional
capacity assessment.

1 ECF No. 15 at 24. Thereafter, for the next four pages, the ALJ summarizes
2 the medical records and compares them to Ms. Gibbs' assessments regarding
3 the severity of her pain, ultimately concluding, "the claimant has not
4 presented objective medical evidence that would support physical or
5 psychological limitation greater than that accounted for in the claimant's
6 residual functional capacity assessment." ECF No. 15 at 28. The Court
7 finds the ALJ's analysis sets forth specific, clear, and convincing
8 reasons for rejecting Ms. Gibbs' symptom-severity testimony, including
9 that Ms. Gibbs' calm presentation at appointments was inconsistent with
10 her reports of the limitations imposed by her pain and anxiety, that Ms.
11 Gibbs failed to react in pain to Dr. Chau's palpation over the typical
12 fibromyalgia points during his consultative examination, and that Ms.
13 Gibbs failed to pursue recommended treatment options such as counseling.
14 The ALJ's analysis comports with Social Security Ruling 12-2p, which
15 acknowledges that fibromyalgia is a complex medical condition for which
16 there is often no objective test to support a diagnosis, but then proceeds
17 to find, based on substantial evidence in the medical records, that Ms.
18 Gibbs' impairments did not limit her to the extent she claimed.
19

20 **2. Brenton Gibbs**

21 Ms. Gibbs contends the ALJ failed to explain why she rejected Brenton
22 Gibbs' lay statements regarding Ms. Gibb's panic attacks and anxiety while
23 driving and in the public. In his 2011 Function Report regarding Ms.
24 Gibbs, Mr. Gibbs acknowledged that his wife got the two older kids ready
25 for school and cared for the youngest child at home, she cleaned the
26 house, did laundry, made dinner-tasks which took her a couple of hours a
27 day, manages the household finances, watches television or reads for three
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1 to four hours a day, and that on at least two occasions she has gotten
 2 sick when traveling within the community due to her anxiety.

3 In regard to Mr. Gibbs, the ALJ wrote:

4 The undersigned has also considered the 3rd-party Function
 5 Report from the claimant's husband, Brenton Gibbs (Exhibit 5E),
 6 but finds that it merely recites the claimant's allegations of
 7 limitation. As the undersigned has found that these allegations
 8 lack credibility to the extent they are inconsistent with the
 9 residual functional capacity outlined above, any recitation of
 10 those allegations likewise lacks credibility.

11 ECF No. 15 at 29. The Court finds no error in the ALJ's acceptance of Mr.
 12 Gibbs' observations and reports that were consistent with the determined
 13 residual functional capacity, and rejection of those that were
 14 inconsistent determined residual functional capacity. See *Bayliss v.*
 15 *Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (requiring an ALJ to "only
 16 give germane reasons for discrediting the testimony of lay witnesses" and
 17 that "[i]nconsistency with medical evidence is one such reason"); *Molina*
 18 *v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012). The ALJ properly compared
 19 Mr. Gibbs' comments regarding Ms. Gibbs' anxiety and panic attacks while
 20 driving and outside the home, to Ms. Gibbs' calm appearance and mannerisms
 21 while at her medical appointments, as reflected in the medical records.

22 **3. Treating Opinions**

23 Ms. Gibbs contends the ALJ improperly rejected the opinions of Dr.
 24 Whitson, Dr. Davis, and Mr. Anderson in regard to the severity of her
 25 impairments and the impact they have on her ability to work.

26 In regard to Dr. Whitson, Ms. Gibbs highlights that he noted that
 27 Ms. Gibbs was limited to sedentary work and had many postural limitations
 28 due to fibromyalgia and, therefore, the ALJ erred in finding that the
 record did not contain diagnostic evidence identifying a disease that

1 explained Ms. Gibbs' debilitating symptoms. Upon review of Dr. Whitson's
2 records and the ALJ's decision, the Court finds the ALJ sufficiently
3 explained why she concluded that Dr. Whitson's physical-limitation
4 conclusions were based on Ms. Gibbs' subjective statements rather than
5 objective evidence. The ALJ properly discounted Dr. Whitson's opinion
6 regarding the severity and functional effects of Ms. Gibbs' fibromyalgia
7 because the ALJ found Ms. Gibbs incredible as to the severity of her
8 impairments, and this decision was based on substantial evidence in the
9 medical records. The ALJ also recognized that Dr. Whitson failed to provide
10 any "supporting objective diagnostic evidence identifying a disease
11 process to explain or support the claimant's alleged debilitating
12 symptoms" and "there is little in the way of narrative explanation . . .
13 of the claimant's symptomology." ECF No. 15 at 28. See *Tonapetyan v.*
14 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (affirming the ALJ's rejection
15 of the examining physician's opinion, which was based merely on the
16 claimant's subjective complaints—complaints that were appropriately
17 discounted by the ALJ).

20 Ms. Gibbs also argues the ALJ improperly rejected Dr. Davis' opinions
21 that Ms. Gibbs would have difficulty maintaining attendance in the
22 workplace due to her panic disorder with agoraphobia and coping with usual
23 workplace stressors. After reviewing the record, the Court finds no error
24 in the ALJ's decision in this regard. Dr. Davis concluded that Ms. Gibbs
25 in her "current condition" would experience "difficulty maintaining
26 attendance in the workplace secondary to her panic disorder with
27 agoraphobia" and "difficulty dealing with usual workplace stressors," but
28 Dr. Davis also noted that Ms. Gibbs' "depressive disorder could be

1 successfully treated if she was treated with a different medication and
 2 that Ms. Gibbs "could interact with supervisors as well as coworkers and
 3 members of the public." ECF No. 15 at 279; *see Turner v. Comm'r of Social*
 4 *Sec.*, 613 F.3d 1217, 1223 (9th Cir. 2010) (recognizing that an individual's
 5 difficulties do not always equate to a residual function limitation). In
 6 sum, the ALJ fully considered Dr. Davis' findings, and the ALJ's final
 7 determination is consistent with Dr. Davis' findings.

8 Ms. Gibbs also contends the ALJ improperly rejected Mr. Anderson's
 9 opinion that Ms. Gibbs was not limited to sedentary work up to four hours
 10 a day; the Commissioner agrees that because Mr. Anderson was an "other
 11 source" of medical information that the ALJ improperly failed to consider
 12 his information. The ALJ's determination that Mr. Anderson, who is a
 13 physical therapist, was not an acceptable medical source was erroneous as
 14 physical therapists are "other sources." 20 C.F.R. § 404.1513(d); Social
 15 Security Ruling 06-03p. However, this error was harmless. The ALJ's
 16 determination that Ms. Gibbs' subjective reports of the severity of her
 17 impairments was incredible, impacts Mr. Anderson's functional assessment,
 18 which was based on Ms. Gibbs' own report of the extent that her
 19 fibromyalgia caused her pain and affected her everyday activities.

22 **4. Step Five**

23 Finally, Ms. Gibbs submits the ALJ failed to include all of Ms.
 24 Gibbs' limitations as recognized and determined by Dr. Chau, Dr. Whitson,
 25 and Dr. Davis in the hypothetical posed to the vocational expert. As
 26 explained above, the Court concludes the ALJ fully considered each of the
 27 medical personnel's observations and opinions and appropriately

1 discredited those that were supported merely by Ms. Gibbs' personal
2 account of the severity of her symptoms.

3 In addition, Ms. Gibbs posits that the ALJ erred because the jobs
4 identified by the vocational expert are not consistent with the ALJ's
5 hypothetical and/or Dictionary of Occupational Titles. In the hypothetical
6 provided to the vocational expert, the ALJ did not identify a specific
7 exertion level, instead identifying specific limitations, including
8 sitting for up to two hours at a time for six hours total, standing for
9 up to two hours at a time for two hours total, walking for $\frac{3}{4}$ hour at a
10 time for up to $\frac{3}{4}$ hour total, and the ability to use upper and lower
11 extremities for pushing and pulling, including the operation of hand and
12 foot controls. The vocational expert concluded that Ms. Gibbs could
13 perform "sedentary and light work, where there would be an allowance for
14 a sit/stand option." ECF No. 15 at 79. With the identified allowance for
15 the sit/stand option, the Court finds the three light, unskilled jobs
16 identified by the vocational expert are consistent with the hypothetical
17 and the residual functional capacity and are not inconsistent with the
18 Dictionary of Occupational Titles.
19

20 **E. Conclusion**

21 The ALJ applied the correct legal standards and there is substantial
22 evidence in the record to support the ALJ's decision. For the above-given
23 reasons, **IT IS HEREBY ORDERED:**

24

- 25 1. Ms. Gibbs' Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.
- 26 2. The Commissioner's Motion for Summary Judgment, **ECF No. 21**, is
27 **GRANTED**.
- 28 3. **JUDGMENT** is to be entered in the Commissioner's favor.

4. The case shall be **CLOSED**.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to counsel.

DATED this 19th day of October 2015.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge